Supreme Court, U.S.
FILED
JUN 20 1996
OFFICE OF THE CLERK

(5)

No. 95-1376

In the
Supreme Court of the United States
October Term, 1995

Charles T. Robinson,

Petitioner,

v.

Shell Oil Co.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

Douglas A. Hedin
Counsel of Record
812 One Financial Plaza
120 South Sixth Street
Minneapolis, MN 55402
(612) 333-7700

Robert Belton
1708 Cedar Lane
Nashville, TN 37212
(615) 322-2856

Attorneys for Amicus Curiae

1996 – Bachman Legal Printing ■ (612) 339-9518 ■ FAX (612) 337-8053

21pp

QUESTION PRESENTED

Does the term "employees" in Section 704(a) of Title VII of the Civil Rights Act of 1964, making it unlawful for an employer to discriminate against any of its employees or applicants for employment because they have availed themselves of Title VII's protections, include former employees?

LIST OF PARTIES

1. Charles T. Robinson, Petitioner.

2. Shell Oil Company, Respondent.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 70 F.3d 325 (4th Cir. 1995) (en banc).

JURISDICTION

The United States Court of Appeals for the Fourth Circuit issued its opinion and judgment on November 29, 1995. The petitioner invoked the jurisdiction of this Court under 28 U.S.C. §1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

Title VII of the Civil Rights Act of 1964, specifically §701(f), 42 U.S.C. §2000e(b), §703(a)(1), 42 U.S.C. §2000e-2(a)(1), and §704(a), 42 U.S.C. §2000e-3(a).

Interest of *Amicus Curiae* and Summary of Argument

The National Employment Lawyers Association (NELA) is a voluntary membership organization of over 2,000 lawyers who represent employees in labor, employment and civil rights disputes. NELA is one of the largest organizations in the Unted States whose members litigate and counsel individuals, employees and applicants on claims arising out of the workplace.

As part of its advocacy efforts, NELA has filed numerous *amicus curiae* briefs before this Court, singly or jointly with other amici. Some of the more recent cases are ***O'Connor v. Consolidated Coin Caterers Corp.***, 116 S.Ct. 1307(1996); ***Harris v. Forklift Systems, Inc.***, 510 U.S. 17 (1993); ***McKennon v. Nashville Banner Co.***, 115 S.Ct. 879 (1995); and ***Hazen Paper Co. v. Biggens***, 508 U.S. 948 (1993).

NELA has an interest in the issue raised in this appeal because a substantial number of the cases in which its

members are involved arise under federal statutory provisions whose protections are extended to "employees" and "applicants."

NELA concurs with the conclusion of the petitioner that "former employees" are protected from post-employment reprisal by §704(a) of Title VII. In this brief, NELA advances the argument that former employees are protected by Title VII when their claim of retaliation is based on the denial of privilege of employment that the employer confers on its workers. Thus, under the reasoning of ***Hishon v. King & Spaulding***, 467 U.S. 69 (1984), which broadly construed the term "privileges of employment" in section 703(a)(1), 42 U.S.C. §2000e-2(a)(1), employment references are benefits that employers such as Shell Oil make an incident of employment and that is part and parcel of the employment relationship, and cannot be abused in reprisal for the ex-employee's engagement in statutorily-protected activities.

The position NELA takes in the following brief has not been approved or financed by petitioner or his counsel.

The written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3.

STATEMENT OF CASE

After working for Shell Oil Company for a dozen years, Charles T. Robinson was dismissed in 1991. He promptly filed a charge of discrimination with the Equal Employment Opportunity Commission. Fulfilling his duty to mitigate, Robinson sought other employment, listing Shell on his applications. He applied at a company which contacted Shell for a reference. Shell responded negatively, which precipitated a second charge by Robinson, this one alleging that his former employer gave a negative reference in retribution for his first charge.

He eventually filed suit in federal district court under Title VII, alleging that Shell had violated the anti-reprisal provisions of Title VII when it gave a negative job reference about him to a prospective employer.

ARGUMENT

Former Employees Are Protected From Reprisal Under Title VII When Their Claim of Reprisal Involves the Denial of A 'Privilege of Employment' That The Employer Confers On Employees Even Though Not Contractually Bound To Do So.

A. A Literal Interpretation of 'Employee' 'Leaps Over the Boundaries of Common Sense.'

"The best way of answering a bad argument is not to stop it," the nineteenth century essayist Sydney Smith instructs us," but to let it go on in its course till it leaps over the boundaries of common sense." Sydney Smith, *Spring Guns and Man Traps*, in ***Selected Writings of Sydney Smith*** 236 (W.H. Auden ed., 1956). The Fourth Circuit held that term "employee'" in Section 704(a) of Title VII of the Civil Rights Act of 1964 is crystal clear and does not encompass former employees. ***Robinson v. Shell Oil Co.***, 70 F.3d 325 (4th Cir. 1995). Let us let the literalist interpretation of Section 704 "go on in its course" and see what happens.

The literalist interpretation of Section 704 precludes statutory protection of a person who is observed walking out of the EEOC offices during a lunch break or after work by a supervisor who believes she has just filed a charge of discrimination and fires her on the spot. That individual is not *literally* working for the employer at that very moment and is not protected by a *literal* interpretation of the word "employee" in Section 704. With such a pinched construction, the results inevitably will be unjust, unreasonable, and contrary to the broad purpose of the legislation.

We need not belabor the point. Using Syndey Smith's elegant phrase, the literalist interpretation of "employee" in

Section 704 "leaps over the boundaries of common sense."

Now let us turn to reality. The reality is that over a decade ago this Court recognized that employees -- and by implication ex-employees -- are entitled to receive, without discrimination, certain benefits and privileges of their work that do not accrue or become available for use and enjoyment until after the conclusion of their employment. ***Hishon v. King & Spaulding***, 467 U.S. 69 (1984).

B. A Benefit an Employer Confers on Its Workers That Becomes Due Only After the Employment Relationship Ends is a 'Privilege of Employment' Protected by Title VII.

Section 703(a)(1) of Title VII, 42 U.S.C. §2000e-2(a)(1), prohibits discrimination with respect to the "terms, conditions, or privileges of employment" on the basis of "race, color, religion, sex, or national origin." This Court broadly defined the phrase "terms, conditions, or privileges of employment" in ***Hishon v. King & Spaulding***, 467 U.S. 69 (1984), where a female attorney alleged that her rejection for promotion to partnership of a law firm violated Title VII. The lower courts dismissed her complaint on the ground that Title VII was inapplicable to the selection of partners by a partnership, but this Court reversed, holding that she stated a claim for relief under Title VII.

Hishon enunciated two views of the phrase "term, condition or privilege of employment." First, if consideration for partnership was an explicit provision of the associate lawyer's employment contract with the law firm, then it was a "term" or "condition" of employment that the firm was required to provide without regard to her sex. 467 U.S. at 74-75. Second, and most important for the present appeal, ***Hishon*** held that even if the law firm was not contractually obligated to consider the plaintiff for partnership, such a

consideration was a "privilege" of employment under Section 703(a)(1) if her chance or opportunity to become a partner was one of the benefits the law firm regularly granted its associate lawyers. Recognizing the realities of the employment relationship, the Court stated:

> An employer may provide its employees with many benefits that it is under no obligation to furnish by any express or implied contract. Such a benefit, though not a contractual *right* of employment may qualify as a "privileg[e]" of employment under Title VII. A benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion, even if the employer would be free under the employment contract simply not to provide the benefit at all.

Id. at 75. ***Hishon***, in rejecting the employer's argument that advancement to partnership may never qualify as a term, condition, or privilege of employment, further held:

> The benefit a plaintiff is denied need not *be* employment to fall within Title VII's protection; it need only be a term, condition or privilege *of* employment. It is also of no consequence that employment as an associate necessarily ends when an associate becomes a partner. *A benefit need not accrue before a person's employment is completed to be a term, condition or privilege of that relationship. Pension benefits, for example, qualify as terms, conditions, or privileges of employment even though they are received only after employment terminates.*

Id. at 77 (citations omitted; emphasis added).

Eighteen years ago, this Court decided ***Los Angeles Dept. of Water & Power v. Manhart***, 435 U. S. 702 (1978), which provides a concrete example of a benefit or privilege of employment that is not furnished to or enjoyed by an employee until after the formal employment relationship has concluded. The employees' claim in ***Manhart*** was that the employer required male and female employees to make unequal contributions to an employer-operated pension plan even though male and female employees similarly situated in terms of age, years of service and salary would receive the same pension upon retirement. The Court held that the policy was unlawful sex discrimination under Title VII even though the benefit did not ripen until after the employment relationship had ended.

Although the anti-retaliation provision of Section 704(a) of Title VII refers only to "employees and applicants" and Section 701(f), 42 U.S.C. §2000e1(f), defines the term, "employee," to mean an "individual employed by an employer," ***Hishon*** and ***Manhart*** are authorities for holding that Title VII protects employees and former employees whose claim of discrimination is based on the denial of a benefit or privilege of employment that the employer confers on its employees but which does not ripen until after their formal employment relationship has concluded. Thus, Section 703(a)(1) must be construed *in para materia* with Sections 704(a) and 701(f) when determining the circumstances under which former employees are protected from retribution under Title VII.

Numerous types of post-employment fringe benefits are promised by employers to induce employees to remain on board, are earned during the employee's years of service, and are enjoyed only after the employee quits, is laid off, retires or dismissed. These fringe benefits routinely are awarded to employees who prevail in discrimination suits. Robert Belton, ***Remedies In Employment Discrimination Law*** §9.35 (1992)

(listing 19 forms of fringe benefits of which seven may not become available until after termination). The truth is that citizens will be reluctant to enforce their civil rights if their former employers can deny, delay or restrict their receipt of lucrative post-employment fringe benefits in reprisal for their decision to file charges with the EEOC. Even the mere threat of denial of a valuable fringe benefit such as long-term disability, severance pay, stock options or a job reference is a deterrence. *Cf.* ***Speiser v. Randall***, 357 U.S. 513, 526 (1958).

C. An Accurate Employment Reference is A 'Privilege' of Employment.

Employment references from former employers are one of the most valuable sources of information for prospective employers about prospective employees. *See* David C. Martin & Kathryn M. Bartol, ***Potential Libel and Slander Issues Involving Discharged Employees***, 13 Empl. Re. L.J. 43 (1987) (at least 95% of employers check references); Milton M. Mandell, ***The Selection Process: Choosing the Right Man for the Job*** 255-284 (1964) ("discussing study showing that 75% of respondent-employers rely on employment references and identifying the degrees used, e.g., telephone, mail, personal visits). The judiciary has recognized that it is "a fact of business life that employers almost invariably require applicants to provide the names of their previous employers as references when applying for a job.". ***Rutherford v. American Bank of Commerce***, 565 F.2d 1162, 1166 (10th Cir. 1977).

Lower courts have construed Sections 703(a)(1) and 704(a) together to hold that unfavorable (and inaccurate) references given by a former employer to a new, prospective employer may violate the anti-reprisal provision of Title VII. *See generally*, Patricia A. Moore, Note, ***Parting is Such Sweet Sorrow: The Application of Title VII to Post-***

Employment Retaliation, 62 Fordham L.Rev. 205 (1993). The leading case is ***Shehadeh v. Chesapeake & Potomac Tel. Co.***, 595 F.2d 711, 722 (D.C. Cir. 1978), where the plaintiff alleged that her former employer sent unfavorable references to a prospective employer because of her gender and her husband's ancestry. Holding that she had stated a claim under 703(a)(1) of Title VII even though she was no longer employed, the circuit court reasoned that if a former employee is protected under Section 704(a), she also should be protected against post-employment retaliation under Section 703(a)(1).

An employment reference is one of the privileges or benefits that an employer may provide to a former employee even though it is not obligated to do so under an express or implied contract of employment.[1] If an employer adopts a practice of giving employees references, as Shell Oil chose in this case, that practice qualifies as a "privilege" or benefit of

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[1] A recent development in employment references is that many employers have adopted policies, sometimes referred to as "no comment" or "neutral job reference" policies, according to which they refuse to provide references about former employees regardless of whether the request comes from the employees themselves or their prospective employers. *See generally* Bradley Saxton, *Flaws in the Law Governing Employment References: Problems of "Overdeterrence" and a Proposal for Reform*, 13 Yale L. & Pcy. Rev. 45 (1995) (discussing empirical surveys on the growing trend toward "no comment" policies). Because honest, accurate and complete references are among the types of information that employers find most useful when assessing the strengths and weaknesses of applicants, several commentators have advocated the adoption of a rule imposing an affirmative duty on employers to respond to requests for reference information about their former employees. *See* Bradley Saxton, *supra* at 91-99; John B. Lewis, Bruce L. Ottley & Gregory V. Mersol, *Defamation and the Workplace: A Survey of the Law and Proposals for Reform*, 54 Mo. L. Rev. 797, 854-870 (1989); Janet Swerdlow, Comment, *Negligent Referral: A Potential Theory for Employer Liability*, 64 So.Cal. L.Rev. 1645, 1672-73 (1991).

employment under Title VII. The practice of providing an employment reference comprises an "incident of employment," that is "part and parcel of the employment relationship" even though the benefit is not conferred until after the formal employment relationship concludes. ***Hishon***, 467 U.S. at 75. In this respect, a job reference is similar to a pension which ***Manhart*** recognized almost two decades ago as a benefit immunized from discrimination by Title VII even though it is received only after employment ceases.

A central purpose of Title VII will be undercut if an employer can escape its prohibition against discrimination by denying to an employee a valuable privilege of employment that does not ripen until after the formal relationship has ended. And it surely would defeat Section 704 if it were construed to allow an employer to retaliate against a former employee by giving her a false employment reference because she engaged in protected activities. As pointed out above, courts have recognized that employment references are a fact of business life. An accurate and honest reference, earned by the employee over years of loyal service, is an extremely valuable professional asset -- it is comparable to a corporation's reputation or goodwill, or the reputations of its product or the services it markets. Former employees are severely handicapped in their efforts to obtain new jobs if an employer retaliates against them by giving inaccurate, incomplete or false job references because they have asserted their rights under Title VII. Retaliatory references prevent the employee from mitigating damages. 42 U.S.C. §2000e-5(g). Moreover, a former employee likely will be subjected to retaliation by her new employer if it discovers that she was labelled a troublemaker by an earlier employer because she filed a charge with the EEOC or engaged in other protected conduct.

Ex-employees actually desire accurate job references containing relevant data about their work performance. They

are damaged by references containing false or irrelevant information (such as that the ex-employee filed a sexual harassment claim) when these are acts of retribution causally connected to activities immunized by §704. A retaliatory job reference is analogous to an employer's abuse of its qualified privilege in defamation law. Under the law of defamation, employers enjoy a qualified privilege to give prospective employers accurate references about current or former employees. ***Lewis v. Equitable Life Assurance Society***, 389 N.W.2d 876, 890 (Minn. 1986) is a much-cited case setting out the rational for the qualified privilege for employment references: "It is in the public interest that information regarding an employee's discharge be readily available to the discharged employee and to prospective employers, and we are concerned that, unless a significant privilege is recognized by the courts, employers will decline to inform employers of reasons for the discharges." *See also* ***Restatement (Second) Torts*** §595 *Comment* i (1977); Robert D. Sack and Sandra S. Barron, ***Libel, Slander and Related Problems*** §7.3.3.1 (1994). If Title VII is construed to cover ex-employees, employers will not be deterred from issuing honest, accurate, good faith job references because they already are protected from defamation claims by the qualified privilege. It is only when employers abuse the privilege that they forfeit its protection.

As a practical matter, it is not in the economic self-interest of employers to discriminatorily hinder their former employees from landing new jobs by giving them inaccurate or false job references. Reemployment reduces the plaintiff's claims for back pay, which is a prime component of damages in a civil rights suit. *Cf.* ***Albemarle Paper Co. v. Moody***, 422 U.S. 405 (1975); ***Ford Motor Co. v. EEOC***, 458 U.S. 219 (1982).

Finally, and on an even more practical level, it is standard practice for employers and employees, after discharge, to

negotiate severance packages or settlement agreements which encompass claims of discrimination, fringe benefits, and the exact language of references. Because the basic principle of employment law, the at-will presumption, favors management, it usually has the upper hand in these negotiations; but this rough balance is not entirely one-sided. If Section 704 does not protect ex-employees--those who are not working at the time of the act of retribution -- the little bargaining power workers have to negotiate an accurate job reference, a favorable letter of recommendation, the timely payment of fringe benefits, and to avoid post-discharge reprisal vanishes.

Conclusion

For the foregoing reasons, the National Employment Lawyers Association respectfully requests that Title VII be construed to protect "former employees," and that the judgement of the Fourth Circuit be reversed.

Dated: June 20, 1996

Douglas A. Hedin
Counsel of Record
812 One Financial Plaza
120 South Sixth Street
Minneapolis, Minnesota 55402
(612) 333-7700

Robert Belton
1708 Cedar Lane
Nashville, Tennessee 37212
(615) 322-2856

Attorneys for *Amicus Curiae*